Filed 7/28/03 In re Jorge C. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re JORGE C. et al. Persons Coming Under the Juvenile Court Law.	B162047 (Los Angeles County Super. Ct. No. CK48536)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ARTURO O., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles. Steven L. Berman, Referee. Reversed in part, affirmed in part.

Michael A. Salazar, under appointment by the Court of Appeal for Defendant and Appellant.

Lloyd W. Pellman, County Counsel and Robert Stevenson, Principal Deputy County Counsel for Respondent.

Arturo O., the father of Emilia, appeals from the orders denying reunification services and issuing a restraining order forbidding any contact between him and Emilia. He contends there was no substantial evidence to support the court's finding that other children had been sexually molested by him and thus could not be the basis for finding Emilia to be a person described by Welfare and Institutions Code section 300, subdivisions (b), (d) or (j); he was denied his due process rights by the court's sua sponte denial of family reunification services; the court did not have clear and convincing evidence to meet the requirements of Welfare and Institutions Code section 361.5, subdivision (b)(6) and the court abused its discretion by ordering no visitation with Emilia and issuing a restraining order against him.

Respondent concedes, the trial court erred in denying the father family reunification services and visitation as part of those services without first providing him with the precise and demanding substantive and procedural requirements. Therefore, these orders must be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On March 26, 2002, the Department of Children and Family Services, (the Department) filed a petition in juvenile court pursuant to Welfare and Institutions Code section 300, subdivision (b), (d), (g) and (j). It was alleged that on or about July 6, 2001, and on at least four prior occasions, Arturo O. sexually abused his stepchild, Jorge, by fondling the child's genital area. Further, that Jorge's mother knew or should have known of the sexual abuse. It was further alleged that Jorge's abuse placed the child's siblings, Jennifer and Emilia, at risk of similar sexual abuse. It was additionally alleged that the children's mother signed a Voluntary Family Maintenance Contract in which she agreed to not allow the children to have contact with Arturo O., but she had been unable to enforce a restraining order she had obtained against Arturo O.

On June 20, 2002, the court proceeded with a jurisdictional hearing. The court stated it was its understanding that the parties had reached an agreement on the petition

and that the mother and father had both signed waiver of rights. The father stated he had reviewed the waiver with his attorney and that it had been translated and read to him. The court inquired whether the father understood that it was going to read the petition as agreed to by counsel and decide if there were enough facts to sustain the allegations. The court advised the father that when he signed the waiver form, he gave up the right to challenge the allegations at a later date. The father stated that is what he wanted to do.

The court stated it had read and considered the reports and the prerelease investigation as well as the detention report, the petitions, jurisdiction and disposition report and all of the documents on file.

The jurisdiction/disposition report dated May 8, 2002, stated that Jorge had reported to the social worker, "Look he would touch my butt and my balls and I wanted to just kick his ass. I would hate it when he would do that to me. I am very glad that he does not live with us anymore. I do not want for him to live with us." Jorge stated his sister Jennifer never said he had touched her.

Jennifer told the social worker that her stepfather never touched her and that she was told by her mother's sister to say that he had touched her. The mother stated her husband had not done anything to the children. The father denied ever touching Jorge.

The court found the petition as amended true. The court ordered that the father have monitored visits with Emilia when he was released from county jail.

In an interim review report dated July 11, 2002, the doctor who evaluated the children reported it was very likely that Arturo O. sexually abused Jorge and his sister Jennifer and that Arturo O. was currently incarcerated for charges of child sexual abuse.

In an interim Review Report dated October 8, 2002, the social worker made reference to letters the grandmother had received from Arturo O. while he was incarcerated. The letters written in Spanish were attached to the report. The report states that one letter dated August 23, 2002, indicates that Arturo O "will obtain a lawyer and take his daughter . . . away from her mother . . . . That [the mother] better visit him . . . for the safety of the others (referring to other family members.) [Arturo O.] further threatens to file a lawsuit against . . . (Maternal Aunt) for taking his children away. [¶]

[I]n a letter dated 08/22/02, [Arturo O.] is threatening Maternal Uncle, . . . that he will be harm[ed], that [Arturo O.] is aware of his home address if he does contact him in jai[l]. The essence of the letter is based on threatening and intimidating the entire family, it appears that [Arturo O.] is under the impression that the entire family united to harm him by taking his child away from him. [¶] Based on [Arturo O.'s] detrimental behavior toward the adults in the family, [the social worker] recommended that [the father] be ordered monitored visits with his daughter Emilia O. Further, that the Court respectfully advise him that his behavior is inappropriate and places his child at risk. [The Department recommended] that [Arturo O.] be advised that he is not to contact caregivers at their residence nor at their homes." The social worker wrote that she had a telephonic conversation with Arturo O. from the Men's Central Jail. She advised him his behavior was inappropriate and that he should not be writing letters to the family members as he is intimidating them. She advised him that he is breaking the law by making threats. He replied, "I am an innocent man in jail, I did not nothing [*sic*] to the children, I see them as my kids." The social worker advised him that upon his release from jail he was to contact her in order to initiate all of the court orders as he agreed.

On October 8, at the adjudication hearing, counsel for the father objected to the above, stating he had "gone through that letter with the aid of the Spanish interpreter. And the social worker's opinions expressed on this page are that these are threatening letters from [Arturo O.] threatening various members of her family. It's simply an opinion and should be stricken from the report."

The court observed that while the letters were attached to the report of October 8, 2002, they had also been attached to the report of August 13, 2000, and that there had been more than sufficient time to have any objection to those.

Counsel for the father indicated he was not arguing that there was not enough time to review the letters but rather was objecting to the evidence being offered, the social worker's opinion. Counsel represented to the court that it "is in very poor Spanish and difficult to read. It's as if all the pages of it were one long sentence . . . ." The court ruled that the social worker could be cross-examined on it, but other than that the report

came in. The court noted the social worker was in court to be cross-examined. Thereafter, counsel for the father "submitted."

The court observed that the objection was overruled, that the substance of the objection might go to the weight of the evidence, "but it certainly doesn't go to admissibility under the Welfare and Institutions Code. The social worker's reports are admissible with their opinions and their hearsay as [long] as the social worker is available for cross-examination, and [the social worker] is present. So that will be overruled."

Counsel for Emilia argued he had "read through the poor Spanish that was written by the father, and there seems to be a repetition of 'this is not a threat' and, yet, the father has stated that he's going . . . to teach her the biggest lesson of her life and that will be a surprise. And that's from a gentleman who just got released from prison and is on parole. You know, he repeats that none of this is a threat and, yet, he continues to state that he knows where people live, that . . . he knows that everybody is wondering how he got this information. And I believe that he's referring to the individuals that practice here in the courtroom and possibly the social worker. [¶] There has been no court interpretation of these letters, but it's enough for me to request that father submit to a 730 evaluation, and I would request that the visitation with the father at this time be found detrimental to my clients. That the court make that finding, that he submit to the 730 evaluation, and that we see what interaction with the children would be in their best interests. [¶] I am extremely concerned about this elongated diatribe that . . . is attached to the two reports. At this time I don't even know how long ago my clients have seen their father -- I should say Emilia. It's been a long time, and I would request that the court consider this letter and the interpretation by my office of this Spanish letter."

Counsel for the father argued the representation of the contents of the letter was quite inaccurate. He opined there was no threat of physical harm contained in the documents. They are very difficult to read and are in terrible Spanish. He invited the children's counsel "to provide us with chapter and verse if he's going to insist that somewhere in this document there is a threat of physical harm to anyone." Counsel added that the letters were written not when Arturo O. was on probation but while he was

in jail "where [he had] nothing to do but feel sorry for himself and react to being in the situation they were in." The court noted, however, the letters were written when there was a restraining order that he not contact the mother.[1]

Counsel for the farther concluded that what he was requesting was limited monitored visitation that the social worker recommends. The alleged improprieties occurred with an older male child and there had been no showing that Emilia was at any risk with monitored visits with her father.

The Department recommended that the father have monitored visits in a neutral setting.

The court declared the children dependent children of the court and noted it had heard no argument about granting family reunification for the father. The court stated that under Welfare and Institutions Code section 361.5, subdivision (b)(6) he was not entitled to family reunification services at all and the court intended to provide him with none. The court stated it was "absolutely clear that [Jorge] has been severely sexually abused on many occasions."

The court initially ordered monitored visitation at a Department approved location for the father with Emilia. Counsel for the child objected because of the age of the child, that she had not seen him and she did not even know who he was. Thereafter the court changed its ruling based on counsel's argument and stated it had read the letter and could "read a bit of Spanish" and could recognize a threat, veiled or otherwise, when it sees one. The court observed that the father was in complete denial of what he has done to the older children and Emilia is approaching the same age as Jennifer. It then changed its order to no visitation and made a no-contact order with all the children.

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[1] It was clarified that the letters were in fact mailed to the maternal grandmother but the threats were intended to intimidate the entire family.

I.

SUFFICIENCY OF EVIDENCE

Appellant contends there was no substantial evidence to support the juvenile court findings that Jorge and/or Jennifer had been sexually molested by Arturo and thus could not be the basis for finding Emilia to be a person described by Welfare and Institutions Code section 300.[2]

"The petitioner in a dependency proceeding must prove by a preponderance of the evidence that the child who is the subject of a petition comes under the juvenile court's jurisdiction. [Citation.] On review, this court will view the juvenile court record in the light most favorable to that court's order. [Citation.] We may not reweigh or express an independent judgment on the evidence, but must decide only whether sufficient evidence supports the findings of the juvenile court. [Citation.] Issues of fact and credibility are matters for the trial court alone; we may decide only '"'whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact.' [Citation.]" [Citations.]'" (*In re Amy M*. (1991) 232 Cal.App.3d 849, 858.) With this standard of review in mind, we examine appellant's argument, that insufficient evidence supports juvenile court jurisdiction over Emilia.

The record shows that Jorge reported to the social worker that Arturo O. would touch his buttocks and genitals and that this fondling occurred at least four times. He

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[2] Welfare and Institutions Code section 300 provides in pertinent part, "Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: . . . [¶] (b) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child, or the willful or negligent failure of the child's parent . . . to adequately supervise or protect the child from conduct of the custodian with whom the child has been left . . . . [¶] (d) The child has been sexually abused, or there is a substantial risk that the child will be sexually abused . . . by his or her parent . . . or the parent . . . has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse. . . . [¶] (j) The child's sibling has been abused . . . and there is a substantial risk that the child will be abused. . . ."

also told investigators that his stepfather had tried to anally penetrate him. Dr. John M. Chavez, Ph.D. was appointed to conduct an evaluation pursuant to Evidence Code section 730 and following the evaluation concluded it was "very likely" that their stepfather, Arturo O. sexually abused Jorge and his sister Jennifer. He stated it was reported that Arturo O. was currently incarcerated for charges of child sexual abuse. Additionally, while the mother had signed a voluntary family maintenance contract in which she agreed to not allow the children to have contact with Arturo O. and had obtained a restraining order against him, the mother failed to comply with the voluntary contract and the restraining order in that Arturo resided in the home and had regular contact with the children. Substantial evidence supported the trial court's finding that Jorge had been sexually abused by Arturo O. and that Emilia was at substantial risk of being sexually abused. (See *In re Rubisela E.* (2000) 85 Cal.App.4th 177, 198-199.)

II.

FAMILY REUNIFICATION SERVICES

AND VISITATION

Appellant contends the trial court violated his due process rights by sua sponte denying him family reunification services, which was a structural error necessitating automatic reversal. Appellant argues that based on all of the proceedings from the time of Arturo O.'s arraignment on April 3, 2002, through the disposition on October 8, 2002, all parties proceeded on the apparent assumption that family reunification services would be provided to him.

The record indicates that in the reports prepared for hearings, the social worker recommended that the father receive sexual abuse counseling, parenting education and be allowed monitored visits with the child when deemed appropriate by the therapist.

"California's dependency system must pass constitutional muster, because it operates, in many cases, to deprive parents and children of their constitutional rights to parent and of their rights to be raised by their families of origin. It has passed such muster because of the significant safeguards built into this state's dependency statutes. [Citation.]. . . . [¶] . . . . Until permanency planning, reunification of parent and child is

the law's paramount concern. [Citations.] Except under specifically described circumstances, the parent is thus entitled to 12 months, and possibly six more months, of reunification *services* (not just a period of time) aimed at assisting the parent in overcoming the problems that led to the child's removal. [Citations.] The overriding purpose of the dependency system is to 'preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare. . . .' [Citation.] Reunification 'shall be a primary objective,' and '[t]his chapter [Chapter 2, "Juvenile Court Law"] shall be liberally construed to carry out these purposes.' [Citation.] [¶] In keeping with this focus, there is also in force at the dispositional hearing, and at all subsequent prepermanency planning hearings, in other words, at all review hearings, a statutory *presumption* that the child *will* be returned to parental custody. [Citations.] In addition, there are 'precise and demanding substantive and procedural requirements [that] the petitioning agency must have satisfied before it can propose termination [that] are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents.' [Citation.] [¶] For example, at the dispositional hearing, the agency must show by the enhanced standard of clear and convincing evidence that removal of the child is necessary. [Citation.] At the interim review hearings, the agency has the burden of showing by a preponderance of evidence that the return of the child to the parent would be detrimental to the child and that reasonable reunification services have been provided. [Citations.] Before reunification can be terminated, the agency must establish by a preponderance of evidence that it would be detrimental to return the child to the parent. [Citations.] [¶] Another safeguard of particular relevance here is the mandatory six-month, independent judicial review of the case during the reunification period, during which period numerous positive findings are required with respect to every critical, prepermanency planning decision. [Citations.] 'The number and quality of the judicial findings that are necessary preconditions to termination convey very powerfully to the fact finder the subjective certainty about parental unfitness and detriment required before

the court may even consider ending the relationship between natural parent and child.' [Citation.] [¶] Finally, again of relevance here, the dependency statutes provide for *early and complete notification* to the parent of every stage of the proceedings during the entire course of the dependency. [fn.omitted.] [Citation.]" (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 545-547.)

Welfare and Institutions Code section 361.5, subdivision (b) provides an exception to the requirement of family reunification services and states, "Reunification services need not be provided to a parent or guardian . . . when the court finds, by clear and convincing evidence. . . [¶] (6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse . . . to . . . a sibling, or a half-sibling by a parent . . . and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian."

Subdivision (c) provides, "In deciding whether to order reunification in any case in which this section applies, the court shall hold a dispositional hearing. The social worker shall prepare a report that discusses whether reunification services shall be provided. . . . [¶] The court shall not order reunification for a parent or guardian described in paragraph . . . (6) . . . unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child. . . . [¶] (e)(1) If the parent or guardian is incarcerated . . . the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and . . . any other appropriate factors. Reunification services are subject to the applicable time limitations imposed in subdivision (a). Services may include, but shall not be limited to all of the following: [¶] (A) Maintaining contact between the parent and child through collect telephone calls. (B) Transportation services, where appropriate. (C) Visitation services, where appropriate. . . ."

Welfare and Institutions Code section 358, provides in pertinent part: "(a) After finding that a child is a person described in Section 300, the court shall hear evidence on the question of the proper disposition to be made of the child. Prior to making a finding required by this section, the court may continue the hearing on its own motion, the motion of the parent or guardian, or the motion of the child, as follows: . . . [¶] (3) If the social worker is alleging that subdivision (b) of Section 361.5 is applicable, the court shall continue the proceedings for a period not to exceed 30 days. The social worker shall notify each parent of the content of subdivision (b) of Section 361.5 and shall inform each parent that if the court does not order reunification a permanency planning hearing will be held, and that his or her parental rights may be terminated with the time frames specified by law."

The record indicates that Department did not allege Welfare and Institutions Code section 361.5 was applicable. Thus, the Department did not prepare a report discussing whether reunification services should be provided and no one notified the father of the contents of subdivision (b) of section 361.5. However, because the court proceeded by way of section 361.5, respondent concedes the trial court erred. The concession is well taken.

DISPOSITION

The order denying Arturo O. family reunification services and visitation with respect to his child Emelia is reversed and in all other respects the orders appealed from are affirmed.

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MUNOZ (AURELIO), J.*

We concur:

PERLUSS, P. J. WOODS, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.